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Lawyers for the global economy

Jurisdiction and Enforcement of Judgments in the Online Environment

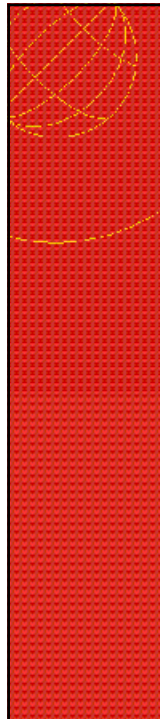
Rufus Pichler
Morrison & Foerster LLP, San Francisco
The State Bar of California, Annual Meeting
Monterey (Oct. 12, 2002)



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Overview

- **The risks**
- **The basic concepts**
- **The rules**
 - United States
 - Europe and other countries
- **National laws and a global medium**
- **What to do?**
 - Rely on self-restraint?
 - Rely on non-enforcement?
 - Rely on international treaties?
 - Self-protection?



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The Risks

- **Online characteristics**
 - Ubiquity
 - worldwide access to information (instantly and simultaneously)
 - worldwide posting of information
 - global markets
 - Limited knowledge
 - who is where?
 - Lack of territorial control




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The Risks


- **Risks for online businesses**
 - Potential worldwide jurisdictional exposure
 - Possibility of violation of foreign laws
 - civil
 - criminal
 - may be legal at origin, illegal at destination
 - Differing consumer protection standards
- **Enforcement issues**
 - Effective redress for consumers
 - Offshore havens and enforcement *abroad*
- **Liability of *local* intermediaries and users**



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The Basic Concepts

- **Categories of jurisdiction**
 - Jurisdiction to adjudicate (competent court)
 - Jurisdiction to prescribe (applicable law)
 - Jurisdiction to enforce (enforcement)
- **Limited relevance of “international law”**
 - No strict territoriality (except for jurisdiction to enforce)
 - Wide discretion regarding extraterritorial assertion of jurisdiction
 - “Genuine link” (practically irrelevant)



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The Basic Concepts *Cont'd*

The Case of the S.S. Lotus (Fr. v. Turk.), 1927 P.C.I.J. (ser. A) No. 10 (Sept. 7)


- „Far from laying down a general prohibition to the effect that states may not extend the application of their laws and the jurisdiction of their courts to persons, property and acts outside their territory, [international law] leaves them in this respect a *wide measure of discretion* which is only limited in certain cases by prohibitive rules; as regards other cases, every state remains free to adopt the principles which it regards best and most suitable.“



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The Basic Concepts *Cont'd*

- **International treaties**
 - Brussels Regulation
 - Other bilateral and multilateral arrangements
 - U.S. not a party to any recognition treaty
 - The Hague Conference discussions
- **National rules on internat'l jurisdiction**
 - Rules of the forum govern adjudicative jurisdiction and procedure
 - Conflict of laws rules of the forum apply
 - Both sets of rules (and results) may differ considerably from country to country



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The Rules: United States

- **General: Due process**
 - *Int'l Shoe v. Washington*, 326 U.S. 310 (1945)
 - Defendant must have „certain minimum contacts with [the forum] such that the maintenance of the suit does not offend ,traditional notions of fair play and substantial justice.“
 - *Hanson v. Denckla*, 357 U.S. 235 (1958)
 - Requires “some act by which the defendant purposefully avails itself of the privilege of conducting activities within the forum state, thus invoking the benefits and protections of its laws.“

The Rules: United States *Cont'd*

- **Online: The “Zippo-test”**
 - Active: clearly doing business over the internet
 - Passive: simply posting information online, which is accessible in another jurisdiction
 - Interactive: weigh level of interactivity and commercial nature of information exchange
- **Online: More recent analysis**
 - Purposeful availment (“something more” than accessibility or mere interactivity or activity)
 - “Effects test”

The Rules: United States *Cont'd*

***Calder v. Jones*, 465 U.S. 783 (1984)**

- **Intentional tort**
- **Brunt of the harm felt in the forum**
- **Conduct “expressly aimed” at forum such that forum was the “focal point” of tortious activity**

The Rules: United States *Cont'd*

- **Application of *Calder* online**
 - Intentional tort: includes other „wrongful“ conduct, *cf. Yahoo! Inc. v. LICRA*, 145 F. Supp. 2d 1168 (N.D. Cal. 2001)
 - Expressly aimed:
 - knowledge (actual or constructive) that tort victim resides and will suffer harm in forum sufficient, or
 - specific direction of conduct towards forum required in addition to such knowledge?
 - courts are divided

United States: Enforcement

- **Recognition and enforcement**
 - (Indirect) jurisdiction of court of origin
 - Proper service of process
 - Fair proceedings
 - Consistent with public policy
 - (Reciprocity)
- **The significance of indirect jurisdiction**

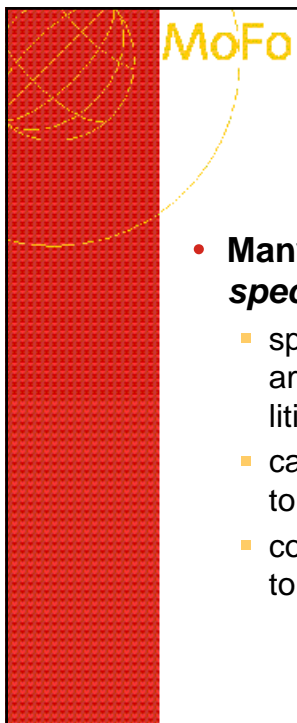


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United States: Trends

- Law is evolving and remains uncertain
- Courts often reach different conclusions based on similar facts
- Courts divided on whether defamation or tort action can always be brought where victim resides and feels harm



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United States: Outlook

- **Many decisions neglect requirements for *specific jurisdiction***
 - specific jurisdiction is based on „relationship among the defendant, the forum, *and* the litigation“
 - cause of action must arise out of or be related to defendant's contacts with the forum
 - courts often consider unrelated other contacts to establish “aggregate” minimum contacts

The Rules: Europe

- **Brussels Regulation**
 - Rules on jurisdiction and enforcement
 - Jurisdiction
 - Statutory jurisdictional bases
 - Prohibits “exorbitant” jurisdictional bases
 - Only applies if defendant resides in Europe
 - Enforcement
 - Full faith and credit throughout Europe
 - Even for judgments based on national law (including exorbitant jurisdictional bases)

The Rules: Europe *Cont’d*

- **National laws**
 - “Exorbitant” jurisdiction
 - Germany, Sweden: Asset based jurisdiction or “don’t forget your umbrella!”
 - France, Benelux: Nationality or residency of *plaintiff*
 - England: Contract governed by English law
 - England, Ireland, Denmark: Tag jurisdiction
 - Several: Jurisdiction over co-defendant
 - Enforceable throughout EU!

The Rules: Europe *Cont'd*

- **National laws *cont'd***
 - Generally accepted jurisdictional bases
 - Domicile
 - Principal place of business
 - Consent (limited with respect to consumers)
 - Tort (place where act or harm occurs)
 - Contract (place of performance, place of entry)
 - Catalog type statutory rules (limited flexibility)
 - Generally (in civil law jurisdictions) no *forum non conveniens*

National Laws and a Global Medium

- **Different national rules on jurisdiction**
- **Connection and extraterritoriality**
- **Different norms and policies**
 - free speech and its limits (hate speech, „obscene“ speech)
 - gambling
 - intellectual property
 - consumer protection and privacy
 - national security

National Laws and a Global Medium

- **Different legal systems**
 - Common law system: favors flexibility and fairness in each individual case over certainty and predictability in general
 - Civil law system: favors certainty and predictability in general over flexibility and fairness in each individual case
- **Reciprocal effects: it always cuts both ways**

International Cases: Elsewhere

- **Some online cases - elsewhere**
 - Australia: *Gutnick* (defamation, civil)
 - France: *Yahoo!* (nazi memorabilia, civil)
 - France: *Yahoo!* (nazi memorabilia, criminal)
 - Germany: *Auschwitzlüge* (negation of holocaust, criminal)
 - Germany: *concert-concept* (TM infringement)
 - Italy: *Moshe D.* (defamation, criminal)
 - Scotland: *Bonnier Media* (TM infringement)
 - Switzerland: (defamation, civil)




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International Cases: U.S.

- **Some online cases - U.S.**
 - *Sklyarov*
 - *iCrave TV*
 - Offshore gambling
 - Security trading
 - *Batzel v. Smith*



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Conclusions

- **Potential exposure in U.S. and elsewhere**
- **The law is evolving (and uncertain)**
- **All countries will enforce their national laws and policies if affected**
- **Increasing risk of criminal prosecution**
- **Change the perspective**



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What to Do?

- Rely on self-restraint?
- Rely on non-enforcement?
- Rely on (hope for) international treaties?
- Self-protection

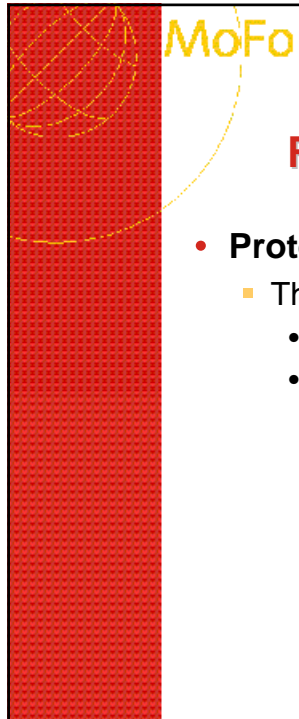


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Rely on Self-restraint?

- **Impossible?**
 - Lack of flexibility in some countries
- **Unlikely in certain sensitive areas**
 - Free speech, hate speech, “obscene” speech, nazi propaganda
 - Gambling
 - Intellectual property and other economic policies
 - Consumer protection and privacy
 - National security
- **Experience**



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Rely on Non-enforcement?

- **Protection through non-enforcement?**
 - The *Yahoo!* example
 - Jurisdiction?
 - Public policy



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Rely on Non-enforcement? *Cont'd*

- **Risks of relying on non-enforcement**
 - Assets or presence in country of origin
 - Now
 - In the future
 - Loss of mobility (business and personal)
 - Assets (now or later) in other countries
 - Countries affording full faith & credit (EU)
 - Countries with liberal enforcement rules
 - Wrong assessment of enforceability at home
 - Public relations
 - Criminal sanctions



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Rely on Non-Enforcement?

- **The flip side**
 - Offshore enforcement havens
 - Offshore gambling
 - Offshore IP havens
 - Offshore hate speech
 - “HavenCo” on *Sealand*
 - Increases liability risks for local intermediaries
 - ISPs
 - Payment intermediaries (PayPal, credit card issuers)
 - Domain name registrars
 - Users



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International Treaties?

- **Existing treaties?**
- **The Hague Convention discussions**
 - History
 - Scope
 - Problems
 - Torts
 - Consumer transactions
 - Absence of clear rules and policies on national level
 - Civil v. common law or “fairness v. certainty”
 - Status and outlook

Self Protection

- **Avoiding specific *transactions***
 - Information (“who and where are you?”)
 - Control (“are you lying?”)
 - Refusal (“sorry!”)
 - Risk of error and costs
- **Avoiding specific *jurisdictions***
 - Education about local laws
 - Localization, zoning, targeting
 - Control
 - Risk of error and costs

Questions?

Thank you!
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